LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 15 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1973
No. 73-783

FRANCES SHARP LICHTENSTEIN,
Petitioner

v.

MAURICE LICHTENSTEIN
and
DARBY FARMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LEWIS KATES,
KATES, LIVESEY & EDELSTEIN,
S. REGEN GINSBURG,
Attorneys for Petitioners

3220 P.S.F.S. Building
12 South 12th Street
Philadelphia, Penna. 19107

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	PAGE
Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Opinions Below	1
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved:	
United States Constitution, Article III, Section 1	5
United States Constitution, Article III, Section 2(1)	5
28 U.S.C. §1912, Power of District Court To Adjudge Damages for Delay	5
Statement of the Case	6
Reasons for Granting the Writ	13
Conclusion	18
Appendices:	
Appendix "A"—Opinion of the Third Circuit Court of Appeals Reversing Award of Fee and Costs for Delay Made by the District Court	19
Appendix "B"—Opinion of the District Court Awarding Plaintiff Reimbursement for Reasonable Counsel Fees and Costs Caused by Vexatious and Contumacious Conduct of the Defendant	25

Opinions Below

District Court, reported as *Lichtenstein v. Lichtenstein*, 55 F.R.D. 535 (E.D. Pa. 1972), appears at Appendix B, infra. The prior opinion of the Court of Appeals, reported as *Lichtenstein v. Lichtenstein*, 454 F. 2d (3rd Cir. 1972), appears at Appendix C, infra. The prior opinion of the District Court, reported as *Lichtenstein v. Lichtenstein*, 321 F. Supp. 152 (E.D. Pa. 1970), appears at Appendix D, infra.

JURISDICTION

The judgment of the Court of Appeals, infra, was entered on June 29, 1973. A petition for rehearing was denied on August 17, 1973. The Court of Appeals on September 26, 1973 recalled the certified judgment it had issued in lieu of a formal mandate, allowing Petitioner herein to and including November 16, 1973, to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether a District Court, in order to preserve its decorum and good order and to prevent a purposeful misuse of that court's time, has power to compel a contumacious and vexatious civil litigant to pay to the innocent party or litigant those counsel fees and costs incurred as a result of the former's wasteful and improper conduct?

2. Whether a District Court has the right to order an innocent litigant to be reimbursed for those counsel fees and costs incurred by reason of and where it has found, and which said findings were affirmed in a prior appeal, that a defendant, after settling litigation by an agreement enforceable as a final decree in equity and entered as an order of the District Court, acted and used the

judicial process contumaciously and vexatiously in an attempt to avoid those obligations?

3. Whether a District Court, after evidentiary hearing, has the right to charge a contumacious and vexatious civil litigant with those counsel fees and costs incurred by an innocent litigant in an attempt to overcome such improper conduct where the offending party has not been formally charged and found guilty of contempt?

4. Whether a Court of Appeals, without oral argument and by a panel consisting of only one of its judges and a District Court Judge, can reverse both findings of fact made by a District Court and previously affirmed by full appellate panel as well as conclusions of law to promulgate a rule of law that a District Court does not have the power and obligation by statute and Article III of the United States Constitution to charge a contumacious and vexatious civil litigant with those counsel fees and costs incurred by an innocent litigant except in those instances where the offending party has been formally charged and found guilty of contempt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article III, Sections 1 and 2

The right of the people to have the Federal Courts exercise the judicial power conveyed by the Constitution and by act of Congress to prevent an abuse of the judicial process by a litigant by compelling such an abusive, vexatious and contumacious litigant to compensate an innocent party for those costs expended to protect that party against such abuse.

The right of the people to be secure that the Federal Courts shall have the power not only to decide and pronounce a judgment, but the obligation to carry it into effect between persons and parties who bring a case before it for decision.

---

28 U.S.C., §1912

Where a judgment is affirmed by the Supreme Court or Court of Appeals, the Court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

STATEMENT OF THE CASE

This is an appeal for a judgment of the United States Court of Appeals for the Third Circuit reversing an order of the District Court which awarded counsel fees and costs in favor of one party and against another party. The counsel fees and costs awarded by the District Court pertain to those incurred after a settlement agreement had, by stipulation, been entered as a final Decree in Equity enforceable as a final order of the District Court. The award of counsel fees concerned time which had been devoted in order to obtain by judicial process monies which the defendant had, by that settlement agreement, agreed to but thereafter refused to pay. The issue is whether a District Court has the constitutional and statutory authority and mandate to compensate an innocent litigant for those costs incurred to enforce a judgment against a litigant who contumaciously, vexatiously and without color of right abused the judicial process in order to avoid the obligation of that judgment.

Plaintiff instituted suit against Individual Defendant and against Corporate Defendant. The stated bases of the action were that Individual Defendant controlled the Corporation Defendant (the owner of the apartment complex) and the Individual Defendant wrongfully withdrew funds from the Corporate Defendant for his own account, thus damaging the equity and ownership interests of the Plaintiff. Jurisdiction was based on diversity of citizenship and that the amount in controversy exceeded $10,000.00.

Statement of the Case

On November 27, 1968 the parties entered into an agreement settling this litigation by providing, inter alia, that:

(1) The Individual Defendant was to deliver to an agreed-upon accountant all books and records of Corporate Defendant and the said accountant was to audit the books and records thereof;

(2) The determination by the said agreed-upon accountant was to be conclusive and binding upon all parties;

(3) The Individual Defendant was to pay to the Corporate Defendant a sum of money determined to be due by said accountant, who was to aggregate all expenditures of the Corporate Defendant and deduct only those which the Individual Defendant could prove had been for a proper business purpose;

(4) Monies which the Individual Defendant had deposited in the District Court in a companion case in order to purge himself from contempt were to be paid over to an escrow agent and were to be used to the extent available to settle and pay the monetary obligations of Individual Defendant as determined by the agreed-upon accountant; and

(5) If by reason of the conclusive and binding determination of the agreed-upon accountant and after application of the escrow funds a deficiency existed, the escrow agent was to notify the Individual Defendant of said deficiency and within 15 days the Individual Defendant was to pay said deficiency to the escrow agent for distribution in accordance with the terms and conditions of the settlement agreement.

On November 27, 1968 the parties executed a stipulation which provided:

> "1. This litigation has been resolved, in accordance with the terms and provisions of [the Settlement Agreement] . . ."
>
> "2. [The Settlement Agreement] . . . imposes upon the parties hereto certain positive duties, obligations and responsibilities."
>
> "3. The duties, obligations and responsibilities imposed by said . . . [Settlement Agreement] shall be enforceable as if contained and set forth in a Final Decree in Equity entered by the District Court . . ."
>
> "4. This litigation shall be marked discontinued and ended by Final Order of the Court, approving terms and provisions of this Stipulation and of . . . [Settlement Agreement] as an Order of the Court."

The District Court approved the settlement agreement and the stipulation as an order of the Court.

The agreed-upon accountant determined the monetary obligation of Individual Defendant. The Individual Defendant deliberately failed to meet with the accountant to discuss any possible exceptions to the account that he might have had, despite efforts made to arrange such a meeting. On January 31, 1969, the accountant submitted to the escrow agent his account in which he set forth the amount he found should be paid by Individual Defendant to Corporate Defendant. Escrow agent then notified Individual Defendant of a deficiency and made demand upon

him to cure the same by payment within fifteen (15) days. The escrow agent had on deposit certain monies available for pro tanto satisfaction of the monetary obligation of Individual Defendant, but Individual Defendant not only refused to pay the notice deficiency but directed the escrow agent not to distribute any funds it already held in pro tanto partial satisfaction.

There ensued a judicial journey spanning more than four years and in which the Plaintiff was compelled to obtain by judicial process that which the Individual Defendant had, by order enforceable as a final decree in equity, agreed to but refused to pay.

Plaintiff first petitioned the District Court to show cause why the Individual Defendant should not be committed for civil contempt, for his failure and refusal to pay the noticed deficiency and for directing the escrow agent not to pay that which it had on deposit for that purpose in pro tanto satisfaction of the monetary obligation of Individual Defendant.

On April 2, 1969, hearing and argument were held in the United States District Court on the petition to commit Individual Defendant for civil contempt.

On April 7, 1969, after hearing Individual Defendant consented to the release of the monies held by the escrow agent in pro tanto satisfaction of his obligation under the settlement agreement, but continued to refuse to pay the balance of the deficiency.

On May 12, 1969, the District Court adjudged Individual Defendant guilty of civil contempt, finding:

"We believe that the record before us amply demonstrates that Defendant's activities in causing Plaintiff to seek to enforce the settlement in court and his defense to Plaintiff's action, were inconsistent with good faith on his part."

The Court of Appeals reversed, holding that contempt would only lie from a specific order and remanded the matter to the District Court for proceedings consistent with its opinion. Plaintiff then petitioned the District Court for a rule to show cause why Individual Defendant should not pay that sum which the accountant had determined to be due. The District Court ordered a hearing on the questions of whether the parties intended by their settlement agreement to be bound finally and conclusively by the accountant's findings. The District Court found as a fact that the parties intended to be bound by the accountant's determinations unless he defrauded somebody; that judicial exceptions to his determinations could not be made; and that the accountant's final determinations were final and conclusive and not subject to appeal, no charges of fraud or corruption having been made.

A final order directing the Individual Defendant to pay to the Corporate Defendant the sum which the accountant had determined to be due and payable was entered. All costs were taxes and assessed against Individual Defendant.

From that order Individual Defendant appealed.

On February 28, 1972 the Court of Appeals affirmed, stating:

"We agree with the District Court that insofar as concerns judicial appeals therefrom, the findings

of the accountant were 'conclusive and binding' on the parties . . .

In the instant case, the purpose of the agreement was to restrict, not encourage, litigation, and the District Court's action—holding that the findings of the accountant were 'conclusive and binding'—was merely an exercise of its power to enforce a settlement agreement which it had approved.

However, this does not mean that the husband could not take exceptions to the findings of the accountant . . .

But, although the right to take exceptions to the accountant's report was inherent in the agreement, nevertheless, the record makes it clear that the actions of the husband in deliberately failing to meet with the accountant, despite the efforts to arrange such a meeting, must be viewed as a waiver of the right.

. . . In our view, the time for putting in all pertinent evidence before the accountant was in January, 1969."

Plaintiff then petitioned the District Court for a rule to show cause why the Individual Defendant should not be ordered to pay reasonable counsel fees and costs incurred to obtain by judicial process that which the Individual Defendant agreed to pay. The Petition averred that by reason of the failures and refusals of the Individual Defendant to pay that amount which the agreed-upon accountant had determined that he was obligated to pay to Darby Farms, Inc. and by reason of the fact that

the Individual Defendant had directed the escrow agent not to distribute the funds the escrow agent held in partial satisfaction of the Individual Defendant's obligation, the plaintiff was caused to proceed in the District Court and to have Darby Farms, Inc. engage counsel to join with the Plaintiff to enforce her rights and the rights of Darby Farms, Inc. under the settlement agreement.

The hours expended by counsel, the necessity for that professional time to have been expended and the reasonableness of the hourly rate assigned, detailed in the petition, were not controverted by Individual Defendant in his answer; nor did the Individual Defendant offer any controverting evidence at the hearing on this motion.

The District Court found that the record before it amply demonstrated that the Individual Defendant's activities in causing the Plaintiff to seek to enforce the settlement in Court and the Individual Defendant's defense to Plaintiff's action were inconsistent with good faith on the part of the Individual Defendant; that the Individual Defendant had acted contumaciously when he had instructed the escrow agent not to pay over to Darby Farms, Inc. in pro tanto satisfaction the amount the escrow agent had on deposit for that purpose, even though that amount was less than what the Individual Defendant admitted he owed; that the Defendant contumaciously persisted in attempting to take exception to the agreed-upon accountant's conclusive and binding determination, even though his own attorney had testified that the right to file exceptions had not even been considered when the settlement agreement was drafted; and that, in summation, the actions of the Individual Defendant:

". . . have been most vexatious, both to the plaintiff and to the Court; they have delayed the resolution of this matter beyond reasonable limits; and they were based on contentions completely unfounded. Accordingly, we believe that Plaintiff should be compensated for those counsel fees which it was necessary for her to expend to enforce the Settlement Agreement."

REASONS FOR GRANTING THE WRIT

The Federal questions presented in this case concern not only the right of an individual litigant to have a District Court protect her and cause her to be reimbursed by the offender for the expenses incurred when a litigious and capricious litigant abuses the judicial process for the purpose of avoiding or evading a final equitable decree issued by a District Court, but the obligation of a District Court, in order to preserve decorum, good order and to prevent a harmful and unnecessary burdening of the judicial process, to assess damages against a contumacious and vexatious litigant for the delay and the abuse caused.

In this case the litigants, to settle pending litigation, agreed that an accountant should prepare a financial statement of the Corporate Defendant and allocate thereon which payments by Corporate Defendant were justified and which should be repaid by Individual Defendant. The determinations of the accountant were agreed to be final and conclusive. Individual Defendant had the burden of justifying the propriety of the expenditures, all

expenditures to be assumed to be improper until proved otherwise. These obligations and duties were agreed to be enforceable as if contained in a final decree in equity. This settlement was approved as a final order of the Court.

Thereafter the Individual Defendant contumaciously, vexatiously and capriciously sought to evade the payment of that which the agreed-upon accountant had determined his obligation to be. He contended that the determination of the agreed-upon accountant in part was in error, but refused to permit the payment of that amount which he conceded he owed until after he was cited for civil contempt. He failed and refused to cooperate with the said accountant, turning over all books and records, even though the consent order of the District Court provided he do so within five days. He failed and refused to sit down with the agreed-upon accountant and explain the expenditures even though the said order provided that all such expenditures were presumed to be improper and he was offered ample opportunities to do so. He attempted to justify his refusal to pay that which the agreed-upon accountant had determined to be his obligation by claiming his right to file in Court exceptions to the accounting, even though, in fact, none was filed and the Individual Defendant's attorney, who drafted the Settlement Agreement, testified and the District Court found that the parties had never contemplated the filing of judicial exceptions.

The District Court found that the actions of the Individual Defendant, in refusing to fulfill his obligations under its final order, which had been intended to terminate this litigation, were contumacious and vexatious and

capricious and that Plaintiff's counsel were entitled to reasonable counsel fees for their time spent in causing Individual Defendant to fulfill his obligations after settlement.

This is not a case where a Plaintiff has requested counsel fees as part of her recovery. This is not a case where counsel for the Plaintiff will be paid twice for services rendered, once by the Plaintiff and once by the Individual Defendant. This is a case which when undertaken, the Plaintiff and her counsel came to an agreement for fees. Plaintiff's counsel performed the services he agreed to perform for the fee he charged when the case was completed and that occurred upon execution of the settlement agreement and its approval and entry as an order of the District Court in 1968. Thereafter, the Individual Defendant reneged and refused to live up to his obligations and, as found by the District Court, did so contumaciously and vexatiously.

In order to secure for the Plaintiff the benefits she had already obtained by the concluded settlement, her counsel was required to perform additional work and it is for that work that the Individual Defendant has been called upon to pay reasonable counsel fees. In the circumstances of this case, the awarding of counsel fees is proper.

Counsel fees and disbursements necessitated by another party's contumacious conduct are among the special damages for which recovery can and which should be obtained. See, *Fleischmann Distilling Corp. v. Maier Brewery Co.*, 386 U.S. 714 (1967); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Brocker v. Brocker*, 429 Pa. 513 (1968).

Reasons for Granting the Writ

It is within the equity jurisdiction of a District Court to award counsel fees which in this instance were required to maintain the good order to the Court and to prevent a party litigant through vexatious and contumacious conduct to escape his post-settlement of obligations. *Vaughan v. Atkinson,* 369 U.S. 527 (1962); *Sprague v. Ticonic Nat. Bank,* 307 U.S. 161 (1939); *Stacy v. Williams,* 50 F.R.D. 52 (1970); *Bernstein v. Brenner,* 320 F. Supp. 1080 (1970); *Rolax v. Atlantic Coastline R. Co.,* 186 F. 2d 473 (1951). See also, *Moore's Federal Practice,* §54.-77(2) 1348.

In *Bata v. Central Penn. Nat. Bk. of Phil. et al.,* 448 Pa. 355 (1972), the Supreme Court of Pennsylvania held that allowance of counsel fees and other expenses entailed by litigation is within the equity jurisdiction of a Court under Pennsylvania Law; that counsel fees would be awarded when, as here, considerations of justice compel such a result; and that counsel fees and disbursements necessitated by a Defendant's numerous breaches of a Settlement Agreement are of the type that should be awarded.

Bata is also relevant on the issue of whether counsel fees awarded for time spent seeking to enforce a Settlement Agreement breachd by a Defendant's vexatious and contumacious conduct should be related to the amount in controversy or the amount of the settlement. In *Bata,* a question arose as to whether counsel fees should be so limited. The Court stated:

> "In addition, there is absolutely no authority or reason for imposing such an arbitrary limitation on an injured party's right to recover for the damages

caused by the contumacious conduct of another party. Such an arbitrary limitation would enable one litigant, acting in contempt of a court order, to coerce his opponent into unjustified monetary or property concessions by capitalizing on his opponent's desire to avoid legal expenses and other damages for which he could not be compensated."

The plaintiff was caused a delay of four years to effect the recovery mandated by the final order of the District Court. Not only does constitutional and statutory provision not entitle a litigant to abuse the judicial process to delay the payment of that which is justly due but mandates both the punishment of the offending litigant and the making whole of the innocent party.

The Court of Appeals disregarded the facts in this case as found by the District Court and as affirmed previously by the Court of Appeals. In its decision reversing the award of counsel fees and costs the Court of Appeals, by a truncated panel consisting of but one of its members and a District Court judge has promulgated what in effect is a precedent supporting whimsical litigation and dilatory tactics without fear or pocketbook pinch, all of which is detrimental to the prompt administration of the justice so necessary and vital to the people.

CONCLUSION

It is respectfully submitted that public issues presented herein are so substantial and so far-reaching in nature that they mandate the granting of this Petition for Writ of Certiorari.

Respectfully submitted,
LEWIS KATES
KATES, LIVESEY & EDELSTEIN
S. REGEN GINSBURG
Attorneys for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 72-1924

Frances Sharp Lichtenstein

v.

Maurice Lichtenstein and Darby Farms, Inc.

MAURICE LICHTENSTEIN, APPELLANT

Appeal from the United States District Court for the Eastern District of Pennsylvania.

Submitted Under Third Circuit Rule 12(6), May 24, 1973.

Before:

Aldisert, *Circuit Judge*, and Stapleton, *District Judge*.

Appendix "A"

OPINION OF THE COURT
(Filed June 29, 1973)

Aldisert, *Circuit Judge.*

The question presented is whether appellant, the losing party in extensive litigation, has demonstrated bad faith, vexation, or wanton or oppressive conduct, warranting the imposition upon him of the prevailing party's counsel fees.

In 1967, Frances Sharp Lichtenstein instituted an action based on diversity of citizenship against her husband, Maurice Lichtenstein, and Darby Farms, Inc., a corporation of which her husband was principal officer and director. Mrs. Lichtenstein, the owner of stock in Darby Farms, claimed that her husband misused corporate funds, and sought an accounting and restitution.

In 1968, the district court approved a settlement agreement which provided for the appointment of a certified public accountant to audit the books of Darby Farms to determine whether Mr. Lichtenstein had misused any funds. The agreement stated that the findings of the accountant "shall be conclusive and binding on all parties," and that if the accountant should find that funds were due Darby Farms, Mr. Lichtenstein was to pay a designated escrow agent any deficiency between the amount found owing by the accountant and funds then on deposit with the escrow agent.

The accountant determined that $47,331.44 was owing to Darby Farms. When Mr. Lichtenstein refused to pay any portion of this amount, Mrs. Lichtenstein insti-

tuted contempt proceedings against her husband. Over Mr. Lichtenstein's defense that he had a right to except to the audit, the court adjudged him in contempt, but added that he could purge himself by paying the deficit.

This court reversed because the settlement agreement lacked the required specificity on which to base a civil contempt. Lichtenstein v. Lichtenstein, 425 F. 2d 1111, 1113 (3d Cir. 1970). We remanded for the district court to determine the intentions of the parties with regard to the appealability of the accountant's audit. On remand, the district court decided that the findings of the accountant were binding and conclusive, and that the settlement agreement did not include a right to appeal or except to the audit. Lichtenstein v. Lichtenstein, 321 F. Supp. 152, 154 (E.D. Pa. 1970). On appeal, this court affirmed the finding that the agreement did not permit "judicial appeals" from the findings of the accountant, but observed that the husband might take exceptions to those findings. We concluded, however, that Mr. Lichtenstein's repeated failure to meet with the accountant constituted a waiver of the right to except. Also, this court determined that the district court erred in using a revalued figure in calculating the award to corporate defendant Darby, and modified the calculation accordingly. Lichtenstein v. Lichtenstein, 454 F. 2d 69 (3d Cir. 1972).

On April 6, 1972, after Mr. Lichtenstein satisfied the judgment, attorneys for Mrs. Lichtenstein and Darby filed in the district court a rule to show cause why Mr. Lichtenstein should not be held responsible for counsel fees and costs. The district court ordered Mr. Lichtenstein to pay to Mrs. Lichtenstein "as costs, the sum of $913.02; to pay to Lewis Kates, Esquire as costs, reason-

able counsel fees in the amount of $12,820. and to pay to S. Regen Ginsburg, Esquire, as costs, reasonable counsel fees in the amount of $5,530." Lichtenstein v. Lichtenstein, 55 F.R.D. 535 (E.D. Pa. 1972). This is the order now under review.

At the outset, we note our agreement with the applicable law as stated by the district court:

> Attorney's fees are not ordinarily taxable as costs and are awarded only in extraordinary cases. Bernstein v. Brenner, 320 F. Supp. 1080 (D.C. D.C. 1970). However, the power to award such fees is within the equity discretion of a district court, Vaughan v. Atkinson, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962), and where a losing party has brought an action or raised a defense in bad faith, vexatiously, wantonly or for oppressive reasons an award of counsel fees to the other party is appropriate. Moore's Federal Practice, §54.77(2), p. 1348; 6 Moore, p. 1352, citing Rolax v. Atlantic Coast Line R. Co., 186 F. 2d 473, 481 (4 Cir. 1951).
>
> 55 F.R.D., *supra*, at 537. See also Hall v. Cole, U.S. (41 U.S.L.W. 4658, 4659, May 21, 1973).[1]

What we disagree with, however, and find clearly erroneous, Krasnov v. Dinan, 465 F. 2d 1298 (3d Cir.

---

[1] Although appellant invites us to apply the law of Pennsylvania, rather than federal law, to this case, because our research discloses no difference between the law of the two jurisdictions in this area, we decline to explore this "conflicts" issue. See Bata v. Central-Penn National Bank of Philadelphia, 448 Pa. 355, 293 A. 2d 343, 352-353 (1972). See also Brocker v. Brocker, 429 Pa. 513, 521, 241 A. 2d 336, 339 (1968).

1972), is the district court's finding "that the record . . . amply demonstrates that defendant's activities in causing plaintiff to seek to enforce the settlement in Court and his defense to plaintiff's action were inconsistent with good faith on his part." 55 F.R.D. at 537.

The history of this litigation indicates that appeals to this court were not frivolous. Although appellant has evidenced a somewhat litigious and contentious nature, we are not persuaded that the record may be said to support a finding that he "brought an action or raised a defense in bad faith, vexatiously, wantonly or for oppressive reasons." Hence, an award of counsel fees was inappropriate in this case.

Although it is true that appellant refused to remit the deficiency as found by the accountant, he did so because he believed the accountant erred in his procedure, and appellant claimed he had a right to appeal or except to the accountant's findings. Appellee argues that the assertion of such a right is frivolous because the district court found that the language of the settlement agreement "meant that no appeals or exceptions could be taken from the certified audit. . . ." 321 F. Supp. at 156. This conclusion overlooks the fact that on appeal this court expressly did not accept the district court's finding as it related to exceptions. "[T]his does not mean that the husband could not take exceptions to the findings of the accountant." 454 F. 2d at 71. We found that the actions of the accountant and both parties demonstrated "reasonably clearly that both sides interpreted the agreement to mean that the accountant might hear exceptions from his determinations prior to their being made final." 454 F. 2d at 72. Admittedly, we found a waiver of that right

here, but nevertheless, when the husband finally sought to assert that right he was acting under a plausible, and ultimately accurate, construction of the agreement.

Similarly, appellant can hardly be said to have appealed his contempt citation in "bad faith," especially since this court determined that the order which provided the basis for the contempt finding was vague and ambiguous.[2]

Finally, in Hall v. Cole, supra, the Supreme Court observed recently that "[i]n this class of cases, the underlying rationale of 'fee-shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." U. S. at (41 U.S.L.W. at 4659). Here, where this court recognized appellant's right under the agreement to except to the accountant's findings, and also determined that appellant was wrongfully held in civil contempt because the agreement was vague and ambiguous, it can hardly be said that appellant acted in bad faith in pursuing these appeals.

The judgment of the district court will be reversed.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

---

[2] Indeed, when this matter was before the district court on remand for a determination as to whether the agreement was intended to preclude appeals and exceptions to the accountant's findings, the court observed that the settlement agreement was written "in a hurry," and, as a result, was "ambiguous" and "unevenly drafted." 321 F. Supp. 154-155.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 42987

Frances Sharp Lichtenstein

v.

Maurice Lichtenstein and Darby Farms, Inc.

OPINION

Wood, J., July 26th, 1972:

Plaintiff, Frances Sharp Lichtenstein, has moved for a rule to show cause why defendant Maurice Lichtenstein should not be compelled to pay $21,790.00 in counsel fees and $913.02 as costs incurred in the litigation of plaintiff's cause of action. Mrs. Lichtenstein instituted suit in 1967 against her then husband and against Darby Farms, Inc., of which her husband was principal officer and director. Mrs. Lichtenstein contended that Mr. Lichtenstein had misused corporate funds and she sought an accounting and repayment of funds allegedly wrongfully distributed by the corporation to Mr. Lichtenstein.

Appendix "B"

On December 5, 1968, this Court approved a settlement agreement presented by the parties which purported to settle both this action and a similar action brought by Mrs. Lichtenstein against her husband and Bethayres Estates, Inc. (Civil Action 42961). In addition the agreement constituted a marital property settlement in connection with a divorce action then pending in the state courts. The agreement provided that the instant litigation "shall be marked discontinued and ended upon the terms and provisions contained therein." The agreement also provided that a certified public accountant, Stanley Merves, would audit the books of Darby Farms. The agreement contained detailed provisions concerning the duties of the accountant but the primary purpose of the audit was to determine whether there had been any misuse of funds by Mr. Lichtenstein. It was further provided with respect to the certified audit that "the determination by said accountant shall be conclusive and binding on all parties." (para. 11(b)(i)). If the accountant were to determine that funds were owed to Darby Farms, Mr. Lichtenstein agreed to pay to a designated escrow agent within 15 days the difference between the amount determined by the accountant and the amount then on deposit with the escrow agent. After the audit was completed, the escrow agent notified Mr. Lichtenstein that the amount which the accountant found owing exceeded the amount then on deposit with the escrow agent by $36,037.66. (A total of $47,331.44 was determined to be owing to Darby Farms and there was already $11,293.78 on deposit with the escrow agent). Thereafter Mr. Lichtenstein sought to take exception to the accountant's audit, but he never appeared at any appointments arranged for this purpose. He

refused to pay any of the $36,000 and in addition directed the escrow agent not to pay over any of the $11,000 already on deposit.

Thereafter Mrs. Lichtenstein instituted proceedings to hold her husband in contempt of the order accompanying the settlement agreement. Mr. Lichtenstein contended that he had the right to except to the audit in this court. On May 16, 1969, we filed an opinion and order holding Mr. Lichenstein in contempt and providing that he could purge himself of the contempt by paying the amount of the accountant's determination. The Court of Appeals reversed this contempt order on the ground that the preceding order on which it was based was not sufficiently definite. The court remanded the case to us to determine what were the intentions of the parties with regard to the appealability of the accountant's audit. On September 8, 1970, we issued an opinion in which we concluded that, " 'in the light of the surrounding circumstances with a view toward the objectives to be accomplished by the settlement agreement' the parties here intended the last sentence of paragraph 11(b)(i) (i.e.: the 'conclusive and binding' provision) to preclude appeals and exceptions such as we have before us from the accountant's audit.' " We accordingly ordered Mr. Lichtenstein to pay a deficiency of $46,639.94 plus interest and taxed costs against him. On January 3, 1972 the Court of Appeals modified the amount of the deficiency and the interest dates but otherwise affirmed the opinion and order. With the case in this posture, plaintiff filed the instant motion on April 6 of this year. On June 13 we heard oral argument and offered both sides the opportunity to present evidence. As both sides declined to do so, we are bas-

ing our decision on the prior record before the Court, particularly the transcript of the hearing of August 12, 1970.

Defendant's initial contention is that plaintiff's motion is untimely because a motion to amend a judgment must be made within ten days after entry of judgment, F. R. Civ. Proc. 59(e). Defendant is correct in asserting that plaintiff may not now move to amend the *judgment* to allow counsel fees. Stacy v. Williams, 50 F.R.D. 52 (N.D. Miss. W.D. 1970). However, it is equally true that plaintiff may seek to amend her Bill of Costs to include counsel fees as costs without violating Rule 59(e), supra. Treating this as such a motion, we may proceed to the merits of plaintiff's claim.

Attorney's fees are not ordinarily taxable as costs and are awarded only in extraordinary cases. Bernstein v. Brenner, 320 F. Supp. 1080 (D.C. D.C. 1970). However, the power to award such fees is within the equity discretion of a district court, Vaughan v. Atkinson, 369 U.S. 527 (1962), and where a losing party has brought an action or raised a defense in bad faith, vexatiously, wantonly or for oppressive reasons an award of counsel fees to the other party is appropriate. Moore's Federal Practice, §54.77(2), p. 1348; 6 Moore, p. 1352, citing Rolax v. Atlantic Coast Line R. Co., 186 F. 2d 473, 481 (4 Cir. 1951). We believe that the record before us amply demonstrates that defendant's activities in causing plaintiff to seek to enforce the settlement in Court and his defense to plaintiff's action were inconsistent with good faith on his part.

In the first instance we observe that Mr. Lichtenstein refused to pay the $36,000 deficiency which the ac-

countant's audit revealed. He did this even though he had agreed that the audit would be conclusive and binding. But defendant went even beyond this. In addition to refusing to deposit $36,000 with the escrow agent, he ordered the escrow agent not to turn over to Darby Farms the $11,000 already on deposit. This was despite the fact that defendant himself admitted in his answer to plaintiff's contempt motion that he owed at least $14,750.37 (See document No. 29). Moreover, defendant deliberately failed to attend the meetings which counsel and the accountant attempted to arrange for the purpose of discussing and excepting to the audit.

After plaintiff initiated contempt proceedings, defendant contended to [for] the first time that he had the right to appeal and except to the audit in this Court. At the hearing which we conducted on August 12, 1970 it was testified to by both counsel who prepared the settlement agreement that the intention of the parties was that in the absence of fraud or incompetence on the part of the accountant, his audit would not be reviewable by this Court. Although there was no evidence or allegation of fraud or incompetence, defendant persisted in his contention that he was entitled to such review.

In short, defendant refused to honor the terms of the settlement agreement while at the same time failing to meet with the accountant to discuss his objections to the audit. Thereafter he resisted an attempt to enforce the settlement with the defense that he was entitled to court review of the audit whereas the testimony of those who drafted the settlement agreement illustrates that such defense was completely groundless. His actions have been most vexatious both to plaintiff and to the court; they

have delayed the resolution of this matter beyond reasonable limits; and they were based on contentions completely unfounded. Accordingly, we believe that plaintiff should be compensated for those counsel fees which it was necessary for her to expend to enforce the settlement agreement.

Finally we come to the question of the amount of counsel fees which should be awarded. Plaintiff seeks counsel fees for two attorneys. She has presented a thoroughly detailed list which contains all entries for time expended by the attorneys on this matter. One attorney has expended approximately 270 hours and seeks $13,495.00. We observe that 13½ of these hours are attributable to the time immediately following the settlement agreement. It does not appear that counsel's services during this period were necessitated by bad faith on defendant's part. Accordingly we will reduce the amount of counsel fees by $675.00 to $12,820.00. The other attorney spent 110 to 111 hours on this matter and requests counsel fees of $8295.00. While the number of hours is reasonable, the hourly rate is one and one-half times that charged by the other attorney. We believe that this is excessive and will reduce it, in accordance with the rate charged by the other attorney, to $5,530.00. Counsel fees therefore total $18,350.00. Plaintiff's Bill of Costs, totaling $913.02 is reasonable and will be taxed against defendant.

Counsel for plaintiff shall submit an appropriate order within fifteen days of the date of this opinion.

Harold K. Wood
J.

By: John J. Harding
Clerk of Court

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 19,352

Frances Sharp Lichtenstein

v.

Maurice Lichtenstein & Darby Farms, Inc.

MAURICE LICHTENSTEIN, APPELLANT

(D.C. Civil Action No. 42987)

Appeal From the United States District Court
For the Eastern District of Pennsylvania

Argued November 9, 1971

Before VanDusen and Rosen, Circuit Judges, and
Layton, Senior District Judge

Appendix "C"

OPINION OF THE COURT
(Filed January 3, 1972)

Layton, Judge.

This is an appeal from a final order directing appellant (husband) to pay the corporate defendant (Darby) sums of money determined to be due by an accountant in accordance with a settlement agreement. The husband contends (1) that the accountant exceeded his authority and (2) that even if he acted within his authority, an appeal can be taken from his determinations.

The plaintiff (wife) and her husband were married in December 1962. Thereafter, Darby was incorporated, Mr. and Mrs. Lichtenstein each owning 1/3 of the stock and one Streeper Karr, III, a corporate officer, the remaining third. The wife claims her husband improperly used his control over Darby to withdraw funds for his own use. He admits wrongfully diverting $37,825.15, but contends that some $35,000 paid by him to Darby on certain occasions should be credited against the amount in dispute.

In 1967, Mrs. Lichtenstein filed a diversity civil action requesting an accounting and repayment of the funds wrongfully distributed by Darby to her husband. However, pursuant to a written agreement between the parties, dated November 27, 1968, this action was terminated. The agreement also purported to settle a similar suit brought by the wife against her husband and another corporate entity, Bethayres Estates, Inc. In addition, the writing constituted a marital property settlement.

This written agreement was incorporated by reference into the Order of the District Court dated December 5,

1968, which discontinued this case. Under the terms of the agreement, an accountant was retained to audit the books of Darby. Both parties agreed that his findings should be conclusive and binding. [1]

On January 21, 1969, the accountant issued his report concluding that the husband was indebted to Darby in the total sum of $47,331.44. A previously designated escrow agent distributed to Darby $14,133.46, from funds then on deposit, leaving a balance of $33,197.98 plus interest due and owing to Darby. The husband made no real effort to contest the findings of the accountant, or to assist him in arriving at his final conclusions. As this Court stated in a prior appeal, "Mr. Lichtenstein sought to take exceptions to the audit, but he never appeared at any appointments arranged for this purpose."[2]

The husband failing to pay the deficiency which had been assessed against him by the accountant, his wife initiated a contempt proceeding in the District Court. On May 12, 1969, the District Court found husband guilty of civil contempt of which he could purge himself by furnishing a bond guarantying payment of sums aggregating $47,697.98. In reversing the District Court's contempt citation on April 2, 1970, this Court decided that the record did not permit a ruling on the issue raised by the husband as to whether he had a legal right to take exceptions to the audit. In effect, it stated the pivotal question to be:

> ". . . whether the parties to the settlement agreement intended that a right to except to the audit was

---

[1] Exhibit "A,", 18a-22a.

[2] Lichtenstein v. Lichtenstein, 425 F. 2d 1111, 1112 (3rd Cir. 1970).

included. (Citations omitted.) The inquiry is directed at interpreting the contract language in the light of surrounding circumstances with a view toward the objectives to be accomplished by the contract." [3]

The Court next remanded the issue to the District Court so that it might supplement the record regarding this issue, stating if the inquiry should prove inconclusive, that Pennsylvania law permitting such appeals in the absence of language specifically prohibiting them would probably govern the disposition of this case. [4]

The District Court ordered a hearing on the issue of whether the agreement precluded judicial exceptions to the conclusions of the accountant, and concluded:

> ". . . that the parties intended the language 'binding and conclusive' to mean that appeals to this Court from the accountant's certified audit were precluded except in case of alleged fraud or corruption on the part of the accountant." [5]

We agree with the District Court that, insofar as concerns judicial appeals therefrom, the findings of the accountant were "conclusive and binding" on the parties. When an agreement is entered into by parties for the express purpose of terminating a pending litigation between them, that agreement should be construed in a manner that tends to restrict judicial action taken with respect to it. As the Supreme Court of Pennsylvania stated:

---

[3] *Ibid.*, 1113, fn. 2.

[4] *Ibid.*, 1113, fn. 2.

[5] Lichtenstein v. Lichtenstein, 321 F. Supp. 152, 154 (E.D. Pa. 1970).

> "Where the right of one of the parties to such an agreement compromising pending litigation is contested, the true interpretation of the agreement should be found . . . within the terms of the decree entered in accordance with the compromise." [6]

In the instant case, the purpose of the agreement was to restrict, not encourage, litigation, and the District Court's action—holding that the findings of the accountant were "conclusive and binding"—was merely an exercise of its power to enforce a settlement agreement which it had approved. [7]

However, this does not mean that the husband could not take exceptions to the findings of the accountant. The actions of the accountant in trying to get in contact with Mr. Lichtenstein, and the attempts of counsel for both sides to arrange a conference between him and the accountant both before and after January 21, 1969, demonstrate reasonably clearly that both sides interpreted the agreement to mean that the accountant might hear exceptions from his determinations prior to their being made final.

But, although the right to take exceptions to the accountant's report was inherent in the agreement, nevertheless, the record makes it clear that the actions of the husband in deliberately failing to meet with the accountant despite the efforts to arrange such a meeting, must be viewed as a waiver of the right.

---

[6] Melnick v. Binenstock, 318 Pa. 533, 179 A. 77, 78 (1935). See, Kelly v. Greer, 365 F. 2d 669, 671 (3rd Cir. 1966), Main Line Theatres, Inc. v. Paramount Film Distrib. Corp., 298 F. 2d 801, 803 (3rd Cir. 1962).

[7] Kelly, supra n. 6.

Appendix "C"

The husband contends, in addition, that certain unusual circumstances showed that his wife changed her interpretation of the contract so that either its meaning had been altered or its effect is no longer binding on him. After the judgment of this Court had been entered, Mrs. Lichtenstein presented a newly-transcribed deposition of Karr to the accountant. The deposition had been taken prior to the execution of the 1968 settlement agreement, and it led the accountant to conclude that the husband's obligations to Darby actually totalled $59,756.44 as of January 31, 1969, and not $47,331.44, as shown on the original audit. We have concluded that the District Court was in error in using the revalued figure in determining the award to Darby in its final Order of September 15, 1970.

In our view, the time for putting in all pertinent evidence before the accountant was in January, 1969. Instead, Mrs. Lichtenstein waited nearly two years. The judgment will be computed as follows: Mr. Lichtenstein will pay Darby $33,197.98 together with 6% interest on $47,331.44 from January 31, 1969 to April 14, 1969, and in addition, 6% on $33,197.98 from April 14, 1969, until the judgment is paid.

The opinion and order of the District Court, as modified in the foregoing paragrph, will be affirmed with costs to be paid by the defendant-appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 42987

Frances Sharp Lichtenstein

v.

Maurice Lichtenstein
and
Darby Farms, Inc.

OPINION AND ORDER

Wood, J., September 8, 1970:

Before us are several motions relating to the implementation of a settlement agreement between the parties. Some consideration of the relevant background of the case is necessary to make clear the issues presented by these motions.

In 1967, this action was instituted by Frances Sharp Lichtenstein naming Darby Farms, Inc., and her then husband Maurice Lichtenstein as defendants. The complaint alleged misuse of the corporate funds by Mr. Lichtenstein

in his capacity as the principal officer and director of Darby. Mrs. Lichtenstein requested an accounting and repayment of funds allegedly wrongfully distributed by the corporation to Mr. Lichtenstein.

On December 5, 1968, this Court approved a settlement agreement presented to it by the parties. This agreement, which provided that the instant litigation "shall be marked discontinued and ended upon the terms and provisions thereof contained therein",[1] also purported to settle a similar suit brought by Mrs. Lichtenstein against her husband and Bethayres Estates, Inc. (Civil Action No. 42961). In addition, the agreement constituted a marital property settlement in connection with a divorce action then pending in the state courts.

Pursuant to the settlement agreement, Stanley Merves, a certified public accountant, was retained to audit the books of Darby Farms, Inc. (para. 11(a)). The agreement contained detailed provisions concerning the duties of the accountant, but the primary purpose of the audit was to determine whether there had been any misuse of funds by Mr. Lichtenstein. It was provided with respect to the certified audit that "the determination by said accountant shall be conclusive and binding on all parties" (para. 11(b)(i)). If the accountant were to determine that funds were due Darby, Mr. Lichtenstein agreed to pay a designated escrow agent within 15 days after notice any deficiency between the amount found by the accountant and funds then on deposit with the escrow agent. After the audit was completed and the escrow agent notified him that the deficiency was $36,037.66, Mr. Lichten-

[1] Document 23.

stein sought to take exceptions to the audit, but he never appeared at any appointments arranged for this purpose.

Upon the failure of Mr. Lichtenstein to pay the amount of the deficiency, Mrs. Lichtenstein initiated proceedings to hold him in contempt of the order accompanying the settlement agreement. At the hearing on this issue, Mr. Lichtenstein's counsel contended *inter alia* in attempting to resist a contempt order that before Mr. Lichtenstein could be compelled to pay the assessed deficiency, he had a legal right to take exceptions to the audit. On May 16, 1969, we filed an opinion and order holding Mr. Lichtenstein in contempt and providing further that he could purge himself by satisfying the assessed deficiency by bond or by payment into the registry of the Court. On appeal, the Circuit Court reversed the contempt order on the grounds that the order on which it was based was not definite and specific enough (No. 17915, filed April 2, 1970) and remanded the case to this Court for a further inquiry into Mr. Lichtenstein's contentions with regard to the accountant's audit.

We now have before us the motion of Mrs. Lichtenstein for a specific order that Mr. Lichtenstein make payment in accordance with the accountant's certified audit, and the motion of Mr. Lichtenstein that he now be permitted to take exception to certain findings of the accountant. The issue to be resolved in deciding these motions is whether or not under the settlement agreement between the parties, appeals to this Court from the accountant's audit were precluded. In this respect, the agreement provides in relevant part (para. 11):

> ". . . (a) Stanley Merves, a Certified Public Accountant shall audit the books and records of Darby

at the cost of Lichtenstein (i.e. Mr. Lichtenstein) and render a certified statement covering all receipts, expenditures and disbursements by Darby to the present...

"(b) In addition to the transfer to Sharp (i.e. Mrs. Lichtenstein) of 200 shares of the capital stock of Darby, free and clear of all liens and encumbrances, as hereinbefore provided, Lichtenstein shall cause to be paid to Darby an amount of money which, when added to any money Darby shall have in its bank accounts, as of the date of final settlement, equal one-quarter of distributions and expenditures made by Darby up to and including February 29, 1968 and one-third of such distributions and expenditures made thereafter . . . except those expenditures determined by Merves to have been for a proper business purpose. 'Distributions' and expenditures, as used in this sub-paragraph, shall be set forth in a Certified Statement by Merves, as follows:

"(i) He shall aggregate all expenditures of Darby . . . as evidenced by its business records and shall deduct therefrom all repayments and all such, and only such, expenditures which were made for a business purpose of Darby. In that regard he shall have access to all pertinent records which he wishes to see and the principals and accountant of Darby shall cooperate with him so that he can determine whether expenditures were made for a business purpose of Darby. Lichtenstein and Darby shall have the burden of presenting documentation that any or all of said expenditures were for a proper business purpose. *The determination by said accountant shall*

be conclusive and binding on all parties." (Our italics.)

(There follows a list of specific directions to the accountant.)

With regard to this issue, the Circuit Court stated in its opinion (fn. 2 at p. 4 of slip opinion) that:

"The settlement agreement . . . also provides that Pennsylvania law should govern the contract.

"Relying on Mussina v. Hertzog, 5 Binney 387 (1812), Mr. Lichtenstein asserts his right to except in the absence of express language limiting that right. The language at issue in Mussina v. Hertzog, supra, was 'final and conclusive'. The Supreme Court of Pennsylvania allowed exceptions to be taken from a referee's award.

"In each subsequent case language construed has contained express averments to the effect that no exceptions or appeals should be taken. The language has consistently been held to preclude exceptions or appeals. See e.g. McRoberts v. Burns, 371 Pa. 129, 88 A. 2d 741 (1952).

"While Mussina v. Hertzog retains vitality, its application, if any, to the case at bar must be subsequent to a resolution of the critical question. Applying Pennsylvania law that question is whether the parties to the settlement agreement intended that a right to except to the audit was included. See e.g. Unit Vending Corp. v. Lacas, 410 Pa. 614, 190 A. 2d 298 (1936). The inquiry is directed at interpreting the contract language in the light of surrounding

circumstances with a view toward the objectives to be accomplished by the contract. Unit Vending Corp. v. Lacas, supra.

"It would appear that the rule of Mussina v. Hertzog, supra, would only be applicable if such an inquiry should prove fruitless. Since there are insufficient facts of record on this appeal, any attempt at resolving the issue would be inappropriate."

In accordance with the Circuit Court's opinion, and considering the language in question somewhat ambiguous, we ordered a hearing on the issue of whether, under the agreement of settlement between the parties, the provision that the determination of the accountant "shall be binding and conclusive" was intended by the parties to preclude exceptions to the audit of the accountant. After such hearing and after a review of the entire record, we have concluded that the parties intended the language "binding and conclusive" to mean that appeals to this Court from the accountant's certified audit were precluded except in case of alleged fraud and corruption on the part of the accountant.

It is clear both from the record and from the testimony before us that Mr. and Mrs. Lichtenstein were very distrustful of each other and were apprehensive that one or the other would attempt to find a loophole in any settlement agreement if that agreement later turned out to be unfavorable to their interests. (Cf. Notes of hearing, p. 12 et seq.) However, it was not possible to settle for a specific sum of money because Mrs. Lichtenstein had no idea how many unjustified disbursements had been made from Darby. It was therefore decided to have an accountant take possession of the appropriate records and deter-

mine what, if any, unjustified disbursements had been made from Darby to Mr. Lichtenstein. Mr. Lichtenstein's counsel at that time (he now has different counsel) sought to work out an arrangement whereby final approval of the settlement would be withheld until the accountant finished his audit. Mrs. Lichtenstein's counsel rejected this section emphatically because of his client's fear of the agreement falling through and inserted the provision that the accountant's conclusions would be "binding and conclusive" (See N.T. 16, 22, 37-40, 51 and Ex. P-1). In order to provide further assurance to both parties, the accountant chosen to do the audit was a friend of counsel for both sides. He had done work for one counsel, and had also worked for partners of the other. As counsel for Mrs. Lichtenstein testified (N.T. 13-14):

> "So I said to (Mr. Lichtenstein's counsel), 'Here is Mr. Merves. Let him have all the authority. He will take the books and records. He will assume all expenditures to be improper. Your man will have to justify them and his word will be the final word. If we have that, we are out of court. We will get paid. You can rest assured that Stanley Merves won't be dishonest in my favor, and I can rest assured the same with you, because we are both his friends, and we both can trust him.' "

Both parties had full faith in Merves' ability and fairness. Even Mr. Lichtenstein's counsel at the time the settlement agreement was negotiated and drafted stated before us that he was certain that any objections to the audit could be resolved amicably and expeditiously with Merves personally, and he never even considered the possibility of legal exceptions to the certified audit such as Mr. Lichten-

stein now seeks to make in this Court. (N.T. 64, 71-2). Therefore at the time of execution of the agreements, it was intended that the accountant chosen would provide a reliable and expeditious resolution of the issues relating to the propriety of prior disbursements from Darby. They intended a final settlement in the near future and a termination of litigation between them, not an accountant's report which would serve as a prelude to protracted appeals on the issues involved in the litigation.

It is true that the agreement is unevenly drafted. This is undoubtedly due to the fact that, as they recognized at the time, counsel for the parties had completely different styles of drafting, and that they had to conclude drafting of the agreement in a hurry. (See e.g. Ex. P-1). However, there is ample evidence on the face of the agreement that the matter was to be rapidly concluded and that protracted appeals to the accountant's audit were not contemplated. For instance, the order of settlement provides that the settlement agreement is "in full and final settlement and in release of any and all claims" and "is approved as an order of this Court and this litigation should be marked discontinued and ended." (Document 23) Moreover, one of the prefatory clauses of the agreement averred that "(Whereas) Sharp, Lichtenstein, and Darby desire amicably to *settle, discontinue and end said litigation* . . . upon certain terms and conditions" (Agreement, page 2, Italics ours). In addition, paragraph 13, which provides for an escrow agent to hold certain funds and distribute them upon presentation of proof of a final divorce between Mr. and Mrs. Lichtenstein (within 60 days of execution of the settlement agreement), obviously contemplates an expeditious payment to Darby (para. 13(a)

(iii)) and not a lengthy intervening period where exceptions were taken and appealed thereby forestalling the time when Mr. Lichtenstein had to pay any deficiency due. Clearly under all these circumstances, the provision of paragraph 11(b) (i) that "the determination by said accountant shall be conclusive and binding on all parties" meant that no appeals or exceptions could be taken from the certified audit absent alleged corruption on the part of the accountant.

Present counsel for Mr. Lichtenstein, however, contends that the word "determination" in the last sentence of paragraph 11(b) (i) (previously quoted) refers back to the word "determine" two sentences before and that therefore the only determination by the accountant which was intended to be "conclusive and binding" was the determination of whether or not certain expenditures were made by Darby for a business purpose. We cannot agree. In the context of the agreement, we see no good reason to distinguish for purposes of finality between the accountant's determinations of whether disbursements were for a business purpose or not, and his other determinations. Many of his decisions in compiling the audit required the same professional judgment employed in determining business purpose; all had a significant bearing on the amount of the deficiency which might ultimately be assessed against Mr. Lichtenstein; all may functionally be classified as determinations. In fact, in paragraph 10(a) the agreement directs the auditor to "determine another matter not related to business purpose. Moreover, as previously stated, it is simply not plausible that the parties in drafting a settlement agreement under these circumstances would attempt to expedite and simplify matters

by making the accountant's determinations as to business purpose final and not subject to appeal, while leaving the others subject to several years of lengthy and difficult appeal. We think that rather than just referring to one sentence of paragraph 11(b)(i), the last sentence of that paragraph (providing that the accountant's determinations were to be "binding and conclusive") related to the whole paragraph and the aggregation of expenditures of Darby and the certified statement which that paragraph directed him to prepare.[2]

We therefore conclude that "in the light of surrounding circumstances with a view toward the objectives to be

---

[2] Mr. Lichtenstein also contends that further evidence of the asserted intent of the agreement to provide that the accountant's decisions were to be binding and conclusive only as to determinations relating to business purpose is that the "binding and conclusive" phrase is found only in paragraph 11(b)(i), while subsequent provisions, i.e. ¶¶11(b)(ii) through 11(b)(v) have no "binding and conclusive" phrase. We cannot agree here either. First, paragraph (i) is general and refers to the whole aggregation that the accountant is to make whereas paragraphs (ii) through (v) provide special directions to the accountant with regard to specific computations. Therefore, for reasons previously stated, paragraph (i) set out a general outline and provided a general rule that the determinations of the accountant would not be subject to appeal. Secondly, we think that the parties intended that the accountant Merves have the same duties and his conclusions the same finality in the case of Darby as in the case of Bethayres; and in the section delineating Merves' duties with respect to Bethayres, all those duties, including specific instructions are contained in a single paragraph (10(b)). At the end of that paragraph, it is provided that, as in the case of Darby, "the determination by said accountant shall be conclusive and binding on all parties."

accomplished by the settlement agreement"[3] the parties here intended the last sentence of paragraph 11(b)(i) to preclude appeals and exceptions such as we have before us from the accountant's audit. Accordingly, we will direct that counsel for Mrs. Lichtenstein submit an order compelling Mr. Lichtenstein to pay those sums which the settlement agreement obliges him to pay once the accountant has submitted his final certified audit.

ORDER

And now, this 8th day of September, 1970, It Is Ordered that counsel for the plaintiff submit to this Court a final order in accordance with the foregoing opinion.

Harold K. Wood,
J.

---

[3] The inquiry which the Circuit Court directed us to make, supra.